IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA552/2022
[2023] NZCA 343

BETWEEN	PETER THOMAS KOHU Appellant
AND	THE KING Respondent

Hearing:	9 May 2023
Court:	Mallon, Moore and Fitzgerald JJ
Counsel:	A T Sykes and H J Rameka for Appellant A J Gordon and G Banuelos for Respondent
Judgment:	4 August 2023 at 12 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] Following a sentence indication, Mr Kohu pleaded guilty in the Rotorua District Court to one charge each of wounding with intent to cause grievous bodily harm,[1] assault with a weapon,[2] and intentional damage.[3]

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1 Crimes Act 1961, s 188(1); maximum penalty 14 years' imprisonment.
2 Section 202C(1)(a); maximum penalty five years' imprisonment.
3 Section 269(2)(a); maximum penalty three years' imprisonment.

[2] On 19 September 2022 Judge MacKenzie sentenced Mr Kohu to five years and two months' imprisonment on the wounding charge and concurrent sentences of six months' imprisonment on the charges of assault with a weapon and intentional damage.[4]

[3] Mr Kohu appeals his sentence on the grounds that the Judge failed to give proper or sufficient weight to the tikanga Māori aspects of the restorative justice process, the genuine remorse expressed by Mr Kohu and the combined weight of the various cultural factors set out in a comprehensive s 27 report.

The procedural background

[4] We set out the events that preceded the sentence indication because this is necessary to properly understand the circumstances surrounding the entry of Mr Kohu's guilty pleas and whether he properly understood the alleged factual basis on which he was sentenced.

[5] Mr Kohu first appeared on 13 January 2021 and was remanded in custody. On 16 February 2021 he pleaded not guilty to all charges and elected trial by jury. A standby trial was set for 8 November 2021, but it was not reached. Mr Kohu then sought a sentence indication.

[6] On 11 May 2022 he appeared before Judge Marshall for the sentence indication.[5] Because the defence submissions raised an alternative and contradictory narrative to that in the summary of facts, the Judge observed that he could only give an indication on the basis of an agreed summary, explicitly noting that he was aware Mr Kohu did not accept material aspects of the summary.[6] As the Judge said, the alternative account Mr Kohu had given to counsel would materially affect the starting point.[7]

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4 *R v Kohu* [2022] NZDC 18479 [Sentencing notes].
5 *R v Kohu* DC Rotorua CRI-2021-063-000155, 11 May 2022 [Sentence indication].
6 At [2].
7 At [8].

[7] He pointed out that Mr Kohu had three options:[8] to accept the summary and seek an indication (which could be accepted or not after legal advice); to plead guilty and proceed to a disputed facts hearing;[9] or to plead not guilty and go to trial. The Judge said that where a sentence indication is sought, he "must proceed on the basis of" the summary of facts.[10] The Crown expressed reservations about the Court proceeding to a sentence indication where the defendant had raised a defence. Ms Sykes, who appeared for Mr Kohu in the District Court and on this appeal, told the Court that she had spoken to her client three times that week and was bound by her instructions, which was why she was appearing. She said that Mr Kohu was very clear he wanted the first option offered by the Judge.

[8] The Judge then proceeded to give the sentence indication.[11] He considered the offending sat at the upper end of band two or the lower end of band three of *R v Taueki*,[12] and indicated a starting point of eight years' imprisonment and a 20 per cent discount for the guilty pleas.[13] He noted that in the event the indication was accepted there could be other reports of benefit to Mr Kohu, adding however that the end sentence would be unlikely to be one that would permit a court to consider an electronically-monitored option.[14]

[9] On 19 May 2022 Mr Kohu accepted the indication, and a sentencing date was set. In advance of sentencing, a restorative justice conference was convened on 13 June 2022 with W, Mr Kohu's partner, the primary victim in respect of the wounding charge. A s 27 report was also prepared, as was a Provision of Advice to the Courts (PAC) report. Letters of support were obtained. Mr Kohu wrote a letter addressed to the sentencing Judge.

[10] On 19 September 2022 Judge MacKenzie sentenced Mr Kohu.[15]

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8 At [8].
9 Sentencing Act 2002, s 24.
10 Sentence indication, above n 5, at [8].
11 At [3]–[12].
12 *R v Taueki* [2005] 3 NZLR 372 (CA) at [34].
13 Sentence indication, above n 11, at [11]–[12].
14 At [12].
15 Sentencing notes, above n 4.

The offending

[11] The facts relied on by her Honour as set out in her sentencing remarks are reproduced below:

> [5] On 13 January last year, [W] went to the second victim's home. The second victim is [A]. This was in the early hours of 13 January 2021. She appeared to be upset. While [W] was at [A]'s home, you telephoned her. She told you that she was at [A]'s address. About 20 minutes later, you arrived at the address carrying a hammer. [A] answered the door. You barged into the house. You sat across from [W] at a table and put the hammer on the table. The two of you started arguing.
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> [6] You became angrier and yelled at [W], "You're my bitch and come home now." You picked up the hammer and struck [W] once to the face. You stood up over her and hit her with a hammer about three or four times all around the head and face. As [A] tried to intervene, you swung the hammer towards him to try and prevent him from helping. He was able to avoid the blow. You then pushed [W] out of the door and as you did, you struck the walls of [A]'s home with your hammer, causing four holes in the wall.
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> [7] You pushed [W] out onto the road and continued your assault. As [W] was in the foetal position on the road, you kicked at her at least twice, as if you were striking a soccer ball and stopped only once police had arrived. You fled over the back fence and were located a short time later by a police dog handler.
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> [8] [W] sustained a laceration above her right eyelid and swelling to her face. As [W]'s injuries were significant, police took her to Rotorua Hospital for treatment but, when police left, she discharged herself before receiving treatment.

Personal circumstances

[12] At the time of his sentencing, Mr Kohu was 35 years old. He has eight children, seven from a previous relationship and one with W.

[13] The s 27 cultural report records that he is a patched member of the Mongrel Mob, having been associated with that gang since the age of 13. He was inspired to join by his uncle who was a member. The report records that it was through the gang that Mr Kohu first gained a real sense of "family" given his unsettled childhood, which included exposure to physical violence, sexual abuse and alcohol abuse. Although he maintained his affiliation with the Mongrel Mob, he did not formally join the gang as a patched member until he was an adult at about the age of 25. Through his

connections with the gang, he witnessed extreme levels of violence and "bashing", which the writer of the s 27 report considered contributed to his proclivity for violence.

[14] The s 27 report also noted that, although he described himself as Māori, he had limited knowledge of his whakapapa. While in prison, he had learned a basic pepeha but was unable to relay this to the report writer. Mr Kohu's lack of knowledge, connection and comprehension of Te Ao Māori was described as typical of Māori who had been raised away from their whānau, hapū and iwi. His cultural disconnect was further exacerbated by the lack of support from his mother and the fact that he did not know who his father was.

[15] Mr Kohu has an extensive criminal history going back to appearances in the Youth Court in the early 2000s. He has at least five previous convictions for violence, most if not all domestically related. The pattern of his other convictions mostly reflects various forms of breaches of court and other orders, driving and dishonesty offences. He has previously served five terms of imprisonment, the longest of which was for 12 months in 2013.

[16] In the course of being interviewed for the s 27 report, Mr Kohu expressed a willingness to participate in prison programmes designed to address anger management, relationships and parenting. He also appeared enthusiastic about serving his sentence in a Māori-focused unit and positive about the possibility of entering a programme to enhance his knowledge of te reo and tikanga should that be available.

The sentencing

Starting point

[17] There is no challenge to the approach taken by the Judge in relation to the starting point of eight years' imprisonment as had previously been indicated by Judge Marshall. This was based on the following aggravating factors which her Honour considered were present to a high degree:[16]

(a) the extreme violence;

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16 Sentencing notes, above n 4, at [14].

(b) the attack to the head; and

(c) the actual use of a weapon, being a hammer.

[18] Judge MacKenzie noted that Judge Marshall could have uplifted that starting point to reflect the offending against A but considered that the assault and the intentional damage convictions could be met by the imposition of concurrent sentences.[17]

[19] We interpolate here, for completeness, that we agree it was open to Judge Marshall to uplift the starting point to reflect the additional charges faced by Mr Kohu, even if part of the same overall course of conduct. These related to the second victim, A. Although not an issue raised on appeal, the fact that an uplift could have been applied is relevant to the ultimate question of whether the sentence imposed by the Judge was manifestly excessive.

Personal factors

[20] As for Mr Kohu's personal circumstances, the Judge considered the indication of a 20 per cent discount for the guilty pleas was generous, even allowing for the complications of COVID-19.[18] She noted that the pleas of guilty were not entered until some 15 months after the original pleas of not guilty and after the trial was unable to be reached.[19] She stated that, generally speaking, a guilty plea credit "that far down the track" would be in the vicinity of 10 per cent or, at the most, 15 per cent.[20] However, given that Judge Marshall had indicated a 20 per cent discount, her Honour was disinclined to displace it.

[21] The Judge then considered Mr Kohu's history of family violence, noting it was not particularly recent.[21] As Judge Marshall had not addressed it, she did not consider an uplift appropriate.

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17 At [19].
18 At [21].
19 At [23].
20 At [23].
21 At [25].

[22] The Judge rejected the submission that there should be a discount of 25 per cent for factors in the cultural report, with a further discount of 10 per cent for combined remorse and the letters of support, which her Honour inferred to be a reference to Mr Kohu's prospects of rehabilitation.[22]

[23] Noting that remorse is a matter of fact and degree, the Judge observed that courts look for tangible evidence that a person is genuinely remorseful.[23] She noted that remorse was difficult to assess in the present case.[24] On the one hand, Mr Kohu had made various statements of remorse in respect of W, but had made no reference to the other victim, A. Her Honour also referred to the apparent contradiction between the comments in the s 27 report, which indicated that Mr Kohu was repentant, regretful and wished to participate in restorative justice, and his apparent refusal to accept the facts he had pleaded guilty to.[25] She concluded that Mr Kohu was not genuinely remorseful.[26] He had presented an alternative, largely exculpatory narrative, and thus appeared not to take responsibility in any real or meaningful way. In particular, the Judge referred to the account given at the restorative justice conference where Mr Kohu claimed that the only violence he had meted out to W was when he pushed her to the ground.[27] He denied calling her his "bitch". The Judge referred to other aspects of Mr Kohu's narrative, which contradicted the summary of facts. She concluded from this that there was no acceptance of responsibility by Mr Kohu and no acceptance that he had struck W repeatedly to the head with the hammer.[28]

[24] In this context, the Judge also referred to the PAC report in which it was reported that Mr Kohu disagreed with the summary of facts despite accepting the sentence indication.[29] The report writer had concluded that this was suggestive of minimal remorse or empathy.

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22 At [26].
23 At [27].
24 At [27].
25 At [27].
26 At [31].
27 At [28].
28 At [29].
29 At [30].

[25] For these reasons, the Judge was not prepared to give any allowance on account of remorse.

[26] However, her Honour did conclude that there was a nexus between the s 27 report and the offending.[30] She also gave Mr Kohu credit for recognising his need to engage in meaningful rehabilitation, although this was tempered by the observation that it would be difficult if Mr Kohu chose to remain a patched member of the Mongrel Mob.[31] Noting that there was "some glimmer of rehabilitative prospects" while recognising there is no set discount for cultural factors, her Honour rejected Ms Sykes' submission that a 25 per cent discount was called for.[32] She noted that, in line with the decision of this Court in *Waikato-Tuhega v R*, any discount could not be more than 15 per cent.[33]

[27] Thus, in summary, the Judge allowed a 15 per cent discount for personal mitigating factors which, when added to the 20 per cent discount for his guilty pleas, reduced the starting point by 33 and a half months, or two years and nine and a half months' imprisonment.[34] This produced an end sentence of five years and two and a half months' imprisonment, which she rounded down to five years and two months' imprisonment.[35]

Approach on appeal

[28] This Court must allow the appeal if satisfied that for any reason there was an error in the sentence imposed and a different sentence should be imposed.[36] The focus is on the end sentence rather than the process by which it is reached.[37] The Court will not interfere where the sentence is within the range that can properly be justified by accepted sentencing principles.[38] To this end, the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to use it.[39]

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30 At [40].
31 At [40].
32 At [41].
33 At [42] referring to *Waikato-Tuhega v R* [2021] NZCA 503.
34 Sentencing notes, above n 4, at [45].
35 At [46].
36 Criminal Procedure Act 2011, s 250(2).
37 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
38 At [36].
39 At [35].

Case on appeal

[29] Ms Sykes submitted that the sentencing Judge failed to give adequate discounts for remorse, participation in restorative justice and Mr Kohu's cultural background factors. She submitted, as she did in the District Court, that a 25 per cent discount for cultural factors and a 10 per cent discount for remorse should have been given.

[30] More particularly, Ms Sykes submitted that, in denying Mr Kohu credit for remorse, the Judge failed to recognise the paramount tikanga principle of restorative justice. This principle values the achievement of ea[40] over all else and can only be determined after a process has been engaged with by the victim and they have intimated their mana has been restored in accordance with the values of manaakitanga and rangatiratanga. She submitted that the Court failed to give adequate discounts for the responsibility taken by Mr Kohu and his remorse evident by the achievement of ea through the process of restorative justice, and also failed to give adequate discounts for Mr Kohu's background as set out in the s 27 cultural report.

[31] Ms Sykes submitted that as of the Supreme Court's judgment in *Ellis v R*, it is settled that tikanga Māori is part of Aotearoa's common law.[41] It is "the source of rights"[42] and a "source of values"[43] and provides a "helpful perspective" when considering the common law.[44] Ms Sykes referred to the concepts of hara, mana, whānaungatanga and ea. She submitted, contrary to the concerns raised in the High Court in *R v Mason,* that these concepts are inherently capable of assisting in the just determination of criminal matters.[45] Against this, she submitted that Mr Kohu's

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40 The notion of ea indicates "the successful closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome, although a state of ea can still be reached even when one or both of the parties remain unhappy with the outcome": *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [135] per Glazebrook J and [185] per Winkelmann CJ both referring to the Statement of Tikanga in the appendix of that judgment.

41 *Ellis v R*, above n 40, at [108] per Glazebrook J, at [171] per Winkelmann CJ, at [257]–[259] per Williams J and at [279] per O'Regan and Arnold JJ.

42 At [176] per Winkelmann CJ.

43 At [176] per Winkelmann CJ.

44 At [256] per Williams J. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZIR 733 at [150] per Tipping, McGrath and Blanchard JJ and at [94] per Elias CJ.

45 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

sentence should have reflected a term closer to three years having regard to the following:

(a) tikanga principles and participation in the restorative justice process;

(b) remorse and acceptance of responsibility; and

(c) the victim's acceptance of the appellant's apology.

[32] We turn to consider the two issues raised on this appeal.

Was the discount for the factors identified in the s 27 report inadequate?

[33] As noted, Mr Kohu received a discount of 15 per cent for this factor. This recognised the nexus between Mr Kohu's upbringing and the offending, including the violence he witnessed both in his upbringing and through his gang associations.

[34] In doing so, her Honour referred to this Court's decision in *Waikato-Tuhega*.[46] There are significant similarities between that case and the present. That case included whānau dysfunction and violence, care, protection and youth justice issues, limited education, alcohol and drugs and cultural disconnection.[47] In *Waikato-Tuhega* this Court allowed a 15 per cent discount for these factors as described in a s 27 report.[48] The Court referred to *Zhang v R* and the role s 27 reports play in the sentencing process.[49] As the full Court in *Zhang* observed, engrained systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity require consideration at sentencing when shown to contribute causatively to an individual's offending.[50] However, to achieve justice in individual cases, flexibility and discretion is required.[51]

[35] In *Waikato-Tuhega* reference was made to the extrajudicial comments of Williams J, that trauma in a person's background, whether intergenerational or

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46 *Waikato-Tuhega v R*, above n 33.
47 At [52].
48 At [57].
49 At [41]–[51] referring to *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
50 *Zhang v R*, above n 49, at [159].
51 At [10(a)].

immediate, does not guarantee they will offend.[52] Williams J had observed that adopting such a broad assumption should be avoided because it amounts to retrospective determinism, dispossessing the offender of their own agency and, in Māori terms, denying them of their mana.

[36] The 15 per cent discount given in the present case for cultural factors reflects an orthodox application of the relevant principles this and other courts have consistently applied.[53] The present case is closely aligned to *Waikato-Tuhega*, which also attracted a 15 per cent discount. Elevating this to the 25 per cent which Ms Sykes presses for would be wholly out of proportion in the circumstances of this case.

[37] It follows we cannot accept the Judge erred in this respect.

Should a discrete discount have been given for remorse?

[38] Ms Sykes submits that a further discrete discount of 10 per cent should have been given by the Judge on account of Mr Kohu's remorse. She argues that participation in restorative justice, in and of itself, warrants a discount based on remorse and that this is further reinforced by the overlying tikanga framework.

[39] As noted above,[54] the Judge rejected the defence submission that Mr Kohu had exhibited any conduct consistent with an expression of remorse. The Judge reasoned that Mr Kohu's repeated failure to accept the summary of facts to which he pleaded guilty undermined any declarations he was remorseful to such an extent that no discount could be given.[55]

[40] It is now well established that a discrete discount for remorse will be appropriate where a "proper and robust evaluation of all the circumstances"

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52 *Waikato-Tuhega v R*, above n 33, at [50] referring to Joe Williams "Build a Bridge and Get Over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do About It" (Robin Cooke Lecture, Victoria University of Wellington, 4 December 2019) at 20.

53 See the discussion in *King v R* [2020] NZCA 446 at [28]–[30], citing *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241; *Carr v R* [2020] NZCA 357 at [67] and [71]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [66].

54 At [23]–[25].

55 Sentencing notes, above n 4, at [29]–[31].

demonstrates that an offender is remorseful.[56] Remorse need not be extraordinary, although it must be genuine.[57] The onus is on the defendant to show it is so.[58] This Court has previously stated that it will look for "tangible evidence, such as engagement in restorative justice processes".[59] Other examples include the voluntary payment of reparation,[60] and efforts to remedy harm to the community.[61] Where established, remorse tends to attract a discrete discount of between five and 15 per cent.[62]

[41] Mr Kohu's expressions of remorse, or lack thereof, may be found in several documents. For example, in the PAC report it is recorded that Mr Kohu totally disagreed with the summary of facts, stating that he did not take a hammer to A's address nor did he attack anyone with it. His version is that W went to A's house and because W had been away for some time, he rang her to check on her welfare. She told him that she was not alright and asked him to come over. It was there he claims he was greeted by a Black Power member and a Mongrel Mob member. He was attacked with a spade. W sustained a cut above her eye. Mr Kohu admitted he removed his partner from the address. They argued. He said he was not angry; more frustrated and disappointed that W had got into the situation she had.

[42] In the cultural report, Mr Kohu gave a broadly comparable, but slightly more detailed, account. He said that he knocked on the door. It was answered by A. Mr Kohu noticed a cut above W's eye. He pushed past A and walked into the house where he was punched by one of two gang members who were present. He said that was when he first noticed the hammer sitting on the table. He picked it up to defend himself. He denied saying that W was his "bitch". He said one of the gang members had a spade and the other a piece of wood. He admitted to swinging the hammer around but only to protect himself and W from being hurt, and accepted that in the course of doing so, he damaged A's property. He said that once he and W were outside the house, they began to argue. He admitted he was still "hyped" from what had

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56 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64]; and Sentencing Act, s 9(2)(f).
57 *Moses v R,* above n 53, at [24].
58 At [24].
59 At [24].
60 *R v Patterson* [2008] NZCA 75 at [42].
61 *R v Devon Dairy Farms Ltd* [2019] NZDC 20798.
62 *Poi v R* [2015] NZCA 300; *Rowles v R* [2016] NZCA 208; *A v R* [2018] NZHC 543; and *C v R* [2022] NZHC 1807.

happened. His lost his cool and pushed W causing her to fall to the ground. When the police arrived, he was standing over W with the hammer in his hand.

[43] At the restorative justice meeting, W corroborated Mr Kohu's account stating that she was grateful to him because he saved her. Mr Kohu offered W his sincere apologies for his "wrongdoing that night". He said that he was "remorseful for what happened". W apparently accepted his apology as being sincere.

[44] The two irreconcilable versions of events evidently complicate the sentencing exercise. Plainly, if Mr Kohu's version in the PAC report and the s 27 report is correct, then he has pleaded guilty to serious charges for which he had a complete defence. Furthermore, the eight-year starting point simply could not be justified, despite Ms Sykes not challenging that aspect of the Judge's construction of the sentence.

[45] If, on the other hand, the version in the agreed summary of facts to which Mr Kohu pleaded guilty is correct, it is difficult to see how an apology for acts that fall well short of what is alleged could qualify as sincere expressions of remorse for the acts as charged. Viewed in that way, what Ms Sykes is effectively asking the Court to accept is that Mr Kohu should be given a discount for seeking a restorative justice outcome and for apologising to the victim, the Court and others for something very much less serious than that which he admitted when he entered his pleas of guilty in the informed fashion he did.

[46] We accept that, in principle, engagement in restorative justice can achieve ea for the hara committed and lead to the restoration of mana. However, in the context of sentencing credit for remorse, we consider that "the hara committed" must necessarily be the offending as charged. Ms Sykes appears to argue that the process nonetheless achieved a state of ea in this case, although she has not adduced direct evidence from Mr Kohu or, more importantly, W to support this point. In this regard we note the risk that Mr Kohu may have pressured W to corroborate his alternative narrative of events, calling into question whether there was in fact a genuine reconciliation.

[47] It follows that, in the circumstances of this case, we do not consider that mere participation in a restorative justice process, understood in the framework of tikanga Māori, may translate into a discount for genuine and tangible remorse.

[48] Ms Sykes also submitted that the Judge erred in finding that the restorative justice process proceeded solely upon the alternative narrative. This submission appears to be based on a comment in the restorative justice conference report that the police summary of facts was read out and "acknowledged" by Mr Kohu, who apologised to W. However, the report goes on to state that Mr Kohu explained his alternative narrative of events, which was corroborated by W.

[49] In our view, whether or not the restorative justice process was initiated and proceeded on the agreed summary of facts, it is plain that the appellant never truly accepted this version of events and that the process was dominated by the alternative narrative.

[50] As Judge Marshall and the sentencing Judge noted, it was open to Mr Kohu to elect an alternative pathway if he wished to dispute aspects of the facts. Instead, he sought and accepted a sentence indication, following which he repeatedly failed to take responsibility for his actions as charged. The existence of these undisputable facts limits any entitlement he may otherwise have had, either under orthodox sentencing principles or tikanga, to a discount for remorse.

[51] It follows that we are not satisfied that the Judge erred in this respect.

Result

[52] The appeal is dismissed.

Solicitors
Annette Sykes & Co, Rotorua for Appellant
Crown Solicitor, Rotorua for Respondent